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No. 03-883

In the

Supreme Court of the United States

WOLGAST CORP.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE ASSOCIATED BUILDERS AND CONTRACTORS, INC. IN SUPPORT OF PETITIONER

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BRIEF OF AMICUS CURIAE ASSOCIATED BUILDERS AND CONTRACTORS IN SUPPORT OF PETITIONER[1]

INTEREST OF THE AMICUS CURIAE

Associated Builders and Contractors, Inc. ("ABC") is a national trade association representing

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[1] Pursuant to Supreme Court Rule 37.2(a), all parties have given written consent to the filing of this Brief. Letters of consent have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, the Amicus states that this brief was not prepared, written or produced by any person or entity other than the Amicus or its counsel.

more than 23,000 individual employers in the construction industry. ABC's membership includes both union and non-union employers and both general contractors and subcontractors. Many years of interaction between its subcontractor and general contractor membership renders ABC uniquely qualified to address the legal confusion and practical implications of the decisions of the NLRB and the Sixth Circuit in this case.

ABC's members have a strong interest in uniform enforcement of labor laws, particularly with regard to controlling jobsite access in the manner set forth by this Court in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). The *Lechmere* decision established a bright-line rule that a non-employee union agent does not have a right of access to an employer's property, except in those cases where employees are otherwise inaccessible.

The decisions of the NLRB and the Sixth Circuit in the present case depart from the *Lechmere* rule in a manner that creates a significant split of authority among the circuits on an issue of great public importance. Of particular concern to ABC, the decisions below are likely to cause tremendous confusion and upheaval in the construction industry because they disrupt long settled understandings about the right of general contractors to control jobsite access in the construction industry in general, and subcontractor access in particular.

The project-oriented and highly specialized nature of construction work necessitates the substantial use of contractor-subcontractor relationships. At each

work location, a general contractor may have large numbers of subcontractors (both union and non-union) working on various aspects of the construction project. Forcing contractors to allow union agents free run of the contractors' work sites, based solely on provisions in subcontractors' collective bargaining agreements to which the general contractors are not parties, and of which such contractors may not even be aware, unfairly diminishes the contractors' property rights in contradiction to the *Lechmere* rule. In addition, allowing such unfettered access would likely create worksite confusion and lead to potential safety and liability issues which general contractors have the legal right (and legal duty) to control.

Because of these potential problems, as further explained below, amicus ABC strongly supports the Petition for Writ of Certiorari in this case. The decisions of the NLRB and the Sixth Circuit decision will cause serious harm to the construction industry. The Court should grant the Petition and reverse the decisions below in order to resolve the conflicts created by them with *Lechmere* and its progeny in other circuits.

ISSUES

The Amicus hereby adopts and incorporates by reference the Petitioner's Questions Presented for Review.

STATEMENT OF THE CASE

The Amicus hereby adopts and incorporates by reference the Petitioner's Statement of the Case.

SUMMARY OF ARGUMENT

The Petition should be granted in order to resolve a significant and direct conflict between the decisions of the NLRB and the Sixth Circuit and this Court's *Lechmere* decision, as interpreted by numerous other Circuit Courts of Appeals.

The Board and Sixth Circuit decisions ignore and threaten to disrupt long-settled understandings between general contractors and subcontractors in the construction industry with regard to jobsite control. Absent some explicit agreement to the contrary, subcontractors who enter onto a worksite at the invitation of a general contractor do so pursuant to the general contractor's overall responsibility for and control over the jobsite. In particular, it is the general contractor's right and duty to maintain jobsite security and to decide who will be granted access to the jobsite so as not to interfere with the progress of the work. The subcontractor is not free to enter into third party agreements that subordinate the general contractor's

rights and responsibilities, absent clear authorization from the general contractor to do so.

The Petitioner in this case, like most general contractors, had no knowledge of the contents of its subcontractors' union agreements, was not party to any such agreements, and cannot legally be bound by them. By subordinating the general contractor's property rights to the interests of the subcontractor's third party agreement with the union, the decisions below stand on their head settled norms of business conduct in the construction industry as well as fundamental principles of privity of contract.

As a result, the decisions under review directly conflict with this Court's decision in *Lechmere* and later circuit court of appeals cases. Other circuits have repeatedly held that non-employee union agents have no right under the NLRA to gain access to an employer's premises, absent proof that no reasonable alternative means of access to employees exist. The distinction drawn by the Sixth Circuit between "organizational" and "representational" access violates this Court's precedent and ignores the realities of the construction industry. In any event, there is no support for the Sixth Circuit's ruling that the property rights of general contractors are abrogated by a subcontractor's previously unknown and unseen union agreements.

The decisions of the NLRB and the Sixth Circuit create an unworkable and unwarranted expansion of union access rights involving union subcontractors that is in direct conflict with this Court's *Lechmere* decision and the decisions of other circuit courts of appeals. To resolve this important conflict, and to reaffirm the

Court's decision in *Lechmere*, the Petition should be granted and the decisions of the NLRB and the Sixth Circuit reversed.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW BECAUSE THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THE LECHMERE DECISION IN A MANNER WHICH WILL CAUSE CONFUSION AND UPHEAVAL IN THE CONSTRUCTION INDUSTRY.

By granting enforcement to the NLRB's decision, the Sixth Circuit determined that the Petitioner, a general contractor in the construction industry, violated the Act by restricting access by non-employee union agents to a construction jobsite that was indisputably under the general contractor's possession and control. The sole basis for the holdings of the Board and the court of appeals was that a collective bargaining agreement existed between the union and a *subcontractor* that somehow abrogated the general contractor's property interests and entitled the union agents to gain access to the general contractor's premises, over the general contractor's objection.

It is undisputed that the Petitioner in this case had no knowledge of the contents of its subcontractor's union agreement, was not party to any such agreement, and was not legally bound by it. Yet the direct result of the decisions below is to subordinate the general contractor's property rights to the interests of the subcontractor's third party "access" agreement with the

union, in a manner contrary to settled law in the construction industry.

General contractors in the construction industry typically hire subcontractors on the basis of their ability to perform high quality work at efficient prices, regardless of labor affiliation. It is estimated that 80% of all construction work in this country is performed on such an "open" or "merit" basis (as opposed to all-union projects). As a practical matter, general contractors have no way of knowing what contractual arrangements their subcontractors have entered into for the acquisition of labor services, nor do they have any interest in knowing. The general contractor's sole concern is that the subcontractor be prepared to perform the work required, subject to the terms and conditions spelled out by the general contractor in the agreement by which the subcontractor is hired.

It is fundamental that a subcontractor enters onto a jobsite to perform work on the general contractor's terms, not vice versa. This is made clear in the American Institute of Architects (AIA) Standard Contract Documents that form the basis for the vast majority of construction arrangements for work performed throughout the United States. Article 3 describes the general contractor's role on a construction project as follows:

> 3.5 Supervision and Construction Procedure
> 3.5.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have

> control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters.
> ***
> 3.5.2 The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for or on behalf of the Contractor or any of its Subcontractors.

See AIA Standard Contract Documents, reprinted in Stein, *Construction Law*, Appendix (Matthew Bender 2003). *See also, Thill v. Modern Erecting Co.*, 136 N.W. 2d 677 (Mich. 1965)(general contractor on a construction site is regarded as the "possessor" of the land); *Mihlader v. Barton Co.*, 2001 WL 738896 (Mich. Ct. App. June 29, 2001).

It is undisputed that the Petitioner contractor in this case was not a party to any collective bargaining agreements between its subcontractor and the union, and the Petitioner in fact had no knowledge of the specific provisions or even the general applicability of the agreements. Yet pursuant to the decisions below, Petitioner's rights to control access to its job site have been subordinated to the subcontractor's third party agreement.

These decisions create a serious conflict with long standing interpretations of contract law by this Court and other judicial decisions. As the Sixth Circuit itself once recognized: "Under general principles of contract law, it is axiomatic that courts cannot bind a non-party to a contract, because that party never agreed to the terms set forth therein." *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 460 (6th Cir. 1999). That holding was derived from numerous decisions of this Court to the same effect. *See NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972) (successor employer not bound to predecessor's collective bargaining agreement, absent consent by the successor to be bound by it); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Sheldon Co. Profit Sharing Plan & Trust*, 858 F. Supp. 663, 670 (W.D. Mich. 1994) ("The terms and conditions of a contract may not be enforced against a person not a party to it.").

Specifically with regard to the separate contractual status of contractors and subcontractors in the construction industry, other circuits have held that third party contracts entered into by one contractor are not binding on another. *See Cariaga v. Local No. 1184 Laborers Int'l Union of N. Am.*, 154 F. 3d 1072 (9th Cir. 1998) (memorandum opinion) (arbitration procedure in general contractor's labor agreement with union does not apply to subcontractor, where subcontract fails to clearly and unequivocally incorporate by reference the arbitration procedure, and does not state that the contractor agreed to be bound by any collective bargaining agreement between contractor and the union); *see also Interstate Striping, Inc. v. LIUNA*, 1998 U.S. App. LEXIS 22694 (9th Cir. 1998)(same); *Slaught v. Bencomo Roofing Co.*, 25 Cal. App. 4th 744,

748 (Cal. App. 1994) (although parties may validly incorporate by reference into their contract the terms of another document, "reference to the other document must be clear and unequivocal and the terms of the incorporated document must be known or easily available to the contracting parties").

The principal NLRB case relied on by the decisions below to achieve their contrary result, *CDK Contracting*, 308 N.L.R.B. 1117 (1992), itself conflicted with this Court's *Lechmere* holding and basic construction law principles. Thus, in *CDK*, the NLRB concluded that a contractor subjected its property rights to a subcontractor's third party "union access" agreement, solely because the contractor "invited" subcontractors onto the jobsite. Yet it has long been recognized in the common law that invitees remain subject to the control of those who have invited them, and that invitees are not free unilaterally to expand their license to include unauthorized third parties. *Thompson on Real Property* ¶ 64.04(a)(1994).

If the Sixth Circuit's decision in the present case is allowed to stand, thereby subjecting general contractors to third party contractual obligations of their subcontractors, general contractors will face significant liability and safety issues in attempting to control their worksites. For example, general contractors have the statutory responsibility for the safety of all persons on the job site. *See, e.g.*, OSHA Regulation 29 C.F.R. § 1926.16 ("[T]he prime contractor assumes all obligations prescribed as employer obligations under the standards contained in this part, whether or not he subcontracts any part of the work."). It would not be fair or just to first burden a general

contractor with the contractual responsibility for overall jobsite safety and then to take away the corresponding right to control access to the site.

In fact, it is likely that the decisions of the NLRB and the Sixth Circuit would force many general contractors to reevaluate their business relationships with unionized subcontractors. It is well settled that a contractor can refuse to do business with a subcontractor altogether merely because the subcontractor is party to a union agreement. *See Local No. 447, United Assn. of Journeymen and Apprentices of the Plumbing & Pipefitting Industry*, 172 NLRB 128 (1968).

Forcing contractors to be bound by their subcontractors' collective bargaining agreement provisions, to which the contractors themselves are not even parties, would detrimentally interfere with the contractor-subcontractor relationship. The accepted norms of the industry would be disrupted and contractors would often be left with a difficult choice: either refuse to do business at all with unionized subcontractors, or accept duties, liabilities and limitations for which the contractor never negotiated and received nothing in return. This is an unprecedented reversal of longstanding industry relationships and settled contract law.[2]

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[2] Under the Sixth Circuit's holding, any signatory to a labor agreement who is "invited" onto the contractor's property for any reason would arguably bring with them the entire contents of their particular collective bargaining agreement, to be applied to the contractor's work site. No statutory basis exists to allow subcontractor agreements with third parties to override such standard jobsite requirements as security (sign-in) procedures,

In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), this Court held that, "by its plain terms, the NLRA confers rights only on *employees*, not on unions or their non-union organizers." 502 U.S. at 532 (emphasis in original). The Court then applied this distinction to reaffirm that, where reasonable alternative means of access exist, the guarantees of Section 7 do not authorize access to a work site by nonemployee union agents, even under "reasonable" regulations established by the NLRB. *Id.* at 537 (citing with approval *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956)). *Lechmere* has been uniformly interpreted by numerous courts as a bright-line rule dictating nonemployee union agents' access rights to employers' property -- regardless of the union's alleged justification.

In the present case, the Sixth Circuit's decision is premised on limiting the *Lechmere* holding to cases involving "organizational," as opposed to "representational" union activities. As pointed out in the Petition, however, numerous other circuits have repeatedly rejected any such distinction. Thus, in *United Food and Commercial Workers v. NLRB*, 74 F.3d 292, 297 (D.C. Cir. 1996), the D.C. Circuit stated: "*Babcock* establishes (and *Lechmere* reaffirms) a **general rule** under which an employer may deny access

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hard hat rules, clean-up requirements, accommodations for the disabled and many more. Until now, it had been understood that the general contractor set the rules for the project, certainly regarding such basic policies as jobsite security, and all subcontractors and their employees agree to work under the general contractor's (or construction owner's) jobsite conditions. The decisions below plainly upset this equilibrium.

to non-employees seeking to trespass on the employer's property. *Id.* at 297 (emphasis added). The court further observed: "[A]lthough Babcock and Lechmere were organizational cases, the reasoning therein is equally applicable in any situation where the exercise of a section 7 right requires communication of a message to a target group."

The Third Circuit similarly refused to adopt the interpretation of *Lechmere* now espoused by the Sixth Circuit. In *Metropolitan District Council of Philadelphia and Vicinity United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. NLRB*, 68 F. 3d 71 (3d Cir. 1995), the Third Circuit rejected the union's attempt to create a distinction between direct and derivative rights in section 7. The court stated: "We decline to read *Lechmere* so narrowly. The question is not whether the right is described more aptly as direct or derivative, but whether the private property rights of an employer must give way to the rights of non-employee interlopers." 68 F.3d at 75.

Finally, the Ninth Circuit has stated that "[t]he only analysis we are allowed to make under *Lechmere* is to determine whether "non-employee union organizers have reasonable access to employees outside an employer's property." *Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 997 (9th Cir. 1992). Again, this holding conflicts with the Sixth Circuit's decision in the present case.

These uniform holdings in other circuits regarding the scope of *Lechmere* all contradict the underlying premise of the Sixth Circuit's decision that

Lechmere should somehow be limited to the context of union organizing. *Lechmere* created a bright-line rule that has effectively guided employers, unions and courts in determining non-employee union access rights to employer property. The distinction drawn by the Sixth Circuit in this case between "organizational" and "representational" rights is legally untenable and practically unworkable.

The impact of the Sixth Circuit's decision on the construction industry could be drastic. The decision departs from *Lechmere* and from the consistent analysis and interpretation by other courts of appeals. The Petition should therefore be granted and the decision of the Sixth Circuit reversed.

CONCLUSION

For each of the reasons set forth above and in the Petition itself, the Amicus asks that the Petition be granted and the decisions of the Sixth Circuit and the NLRB be reviewed and set aside.

Respectfully Submitted,

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